United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1649 B

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1649

EXXON CORPORATION, successor by merger to ESSO INTERNATIONAL, INC.,

Plaintiff-Appellee,

—against—

A. L. BURBANK & COMPANY, LTD.,

Defendant-Appellant,

—and—

UNITED STATES OF AMERICA,

Defendant-Appellee.

BRIEF FOR APPELLANT A. L. BURBANK & COMPANY, LTD.

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Introductory Statement

On March 14, 1974, a judgment was entered in the District Court for the Southern District of New York after a decision of the Honorable Robert L. Carter, adjudging a recovery by Exxon Corporation against A. L. Burbank & Company, Ltd. ("Burbank") in the amount of $31,111.00, inclusive of interest, plus costs, and dismissing the suit by Exxon Corporation against United States of America ("USA") and dismissing the cross-claim by Burbank

against USA, with costs (A 53a-54a).* This is an appeal by Burbank from that portion of the judgment which dismisses Burbank's cross-claim against USA.

The suit herein was commenced against Burbank and USA to recover the cost of bunker fuel oil furnished to the vessel S.T. ATLAS in the amount of $22,006.00, plus interest and costs. It is agreed by all parties herein that Exxon Corporation must be paid for the bunker fuel oil furnished in the aforesaid amount (A 31a, ¶8), but the question to be decided on this appeal is whether USA or Burbank is ultimately liable to pay for the bunker fuel oil. Burbank contends that USA is liable to it for the price of the oil, with interest and costs, that it must pay to Exxon Corporation.

Statement of Facts

The facts established at the trial are undisputed.

The vessel S.T. ATLAS ("Vessel") was constructed pursuant to Title XI of the Merchant Marine Act, 1936 (46 U.S.C. 1271 *et seq.*) whereby USA, represented by the Secretary of Commerce acting by and through the Maritime Administrator ("Maritime") insured payment of the unpaid balance of the purchase price of the Vessel. The Vessel was owned by Tankers & Tramps Corp. ("Owner") who had issued certain bonds in the aggregate principal amount of the unpaid purchase price of the Vessel, which bonds were insured by USA, acting through Maritime, and were secured by a first preferred ship mortgage on the Vessel in favor of Irving Trust Company ("Irving") (A 31a-32a).

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* Numerals preceded by "A" refer to pages of the Joint Appendix, numerals preceded by "T" refer to pages of the transcript of the trial and letters or numerals preceded by "E" refer to exhibits put into evidence at trial.

By Tanker Consecutive Voyage Charter Party, Contract No. MST-TV-686(X), dated November 4, 1963, Owner chartered the Vessel to USA for a minimum five (5) year period, commencing April/May, 1964 ("Charter") (A 8a, EA and 32a-33a, ¶15).

By Agency Agreement dated July 1, 1964, the appointment of Burbank as the managing and operating agent for the Vessel was confirmed and approved by Maritime (A 7a) and pursuant to the Agency Agreement, a special account was established with Irving to receive the earnings of the Vessel (freight paid by USA under the Charter) and from which Burbank could withdraw funds to pay the operating expenses of the Vessel, including costs of the bunker fuel oil necessary to run the Vessel (the "Special Account") (A 6a). The appointment of Burbank as agent required the approval of Maritime and this approval was given after meetings between representatives of Burbank and Maritime (T50-53). Afterwards, Burbank worked closely with Maritime in managing the operations of the Vessel, as agent (A 38a-39a).

Thereafter, the Owner, being unable to make the payments necessary to redeem the bonds due on July 1, 1965, applied to Maritime for an advance loan in the amount of $276,000.00, so as to pay the principal amount due on the bonds (the "Maritime Advance") (A 11a & 19a). Owner also applied to Irving for an advance loan in the amount of $325,000.00 so as to pay the interest due on the bonds (the "Irving Advance") (A 19a-20a). Maritime and Irving agreed to make the Maritime Advance and the Irving Advance, respectively, and on July 26, 1965, contracts were executed (A 11a, 19a, 33a, ¶17): (i) Contract No. MA-3927, dated July 26, 1965, between Owner and Maritime, and (ii)

Contract No. MA-3928, dated July 26, 1965, between Irving, Owner and Maritime (A 11a-13a, 19a-22a).

Contract No. MA-3928 provides, in part, as follows:

> "1. That the Assignment [i.e. assignment of Vessel's earnings under the Charter] and all monies received thereunder or in respect thereof and held by Irving until applied as herein provided shall be and remain as security, (a) for the Irving Advance until the Irving Advance has been paid in full and (b) for the Maritime Advance, subject to the prior payment in full of the Irving Advance, until the Maritime Advance has been paid in full" (brackets ours).
>
> * * * * *
>
> "3. That after the Irving Advance has been paid in full (i) Irving shall immediately upon receipt by it of each payment of charter hire or other monies under the Assignment advise Maritime in writing of the date and type of payment, amount, and such other information as Maritime may reasonably request with respect thereto; (ii) *Irving shall retain and hold each such payment of charter hire or other monies until Maritime shall have determined the amount (if any) to be paid to the Company (or its agent) for the continued current operation of the Vessel;* and (iii) Irving shall disburse such payment of charter hire or other monies to Maritime and/or the Company (or its agent) and in such amount as Maritime shall direct . . ." (italics ours) (A 21a-22a).

Contract No. MA-3927 provides, in part, as follows:

> "3. In consideration of the Maritime Advance, Tankers & Tramps agrees: * * *

(f) so long as this agreement shall remain in effect, it will, if requested by Maritime apply any and all monies it receives from any source whatsoever [*except . . . (ii) amounts received by Tankers & Tramps for operating expenses pursuant to Agreement, Contract No. MA-3928, or any other agreement approved by Maritime;* and (iii) the $325,000 advanced by Irving Trust Company to Tankers & Tramps on the date hereof] . . . to pay or repay the Note or Alternate Note [i.e. promissory note for the repayment of the Maritime Advance] and any amount payable under paragraph 3(a) hereof;" (brackets and italics ours) (12a-13a).

In accordance with Contract No. MA-3928, a cash collateral account was established with Irving to receive the earnings of the Vessel and from which the Irving Advance and the Maritime Advance could be repaid (the "Cash Collateral Account") (A 37a-38a). Burbank had no authority to withdraw funds from the Cash Collateral Account (A 38a, 42a), but instead, the procedure was for Burbank to submit to Irving statements of the Vessel's operating expenses incurred and, after approval by Maritime, sufficient funds would be transferred from the Cash Collateral Account to the Special Account from which Burbank could make payment (A 37a-38a, 45a). Maritime's approval was routinely given without question (A 47a).

On October 6, 1965, Esso International, Inc. ("Esso"), the predecessor of Exxon Corporation, furnished bunker fuel oil to the Vessel pursuant to Esso's standard form of contract with Burbank, dated March 5, 1965, which contract binds Burbank to pay Esso for the oil (A 30a-31a, E1).

In October, 1965, Irving was repaid the full amount of the Irving Advance (A 38a, 47a).

On November 9, 1965, Burbank received Esso's invoice for the bunker fuel oil furnished to the Vessel, No. 105437, in the amount of $22,006.00 (the "Invoice") (A 39a, EJ).

By letter dated December 3, 1965 to Irving, Burbank requested the transfer of $40,948.65 from the Cash Collateral Account (almost the entire balance in that account) to the Special Account, so that Burbank could make payment of some of the Vessel's operating expenses incurred in the amount of $203,017.24 (A 23a-25a, 40a-41a). A statement of the operating expenses incurred in the latter amount as of "12/2/65," including the Invoice, was attached to and forwarded with the letter dated December 3, 1965 (A 24a-25a, 40a). By letter dated December 14, 1965, USA approved the transfer of funds requested by Burbank (leaving a balance of $1,663.22 in the Cash Collateral Account) to be applied against the expenses listed on the statement prepared as of "12/2/65" (A 26a, 41a).

On December 20, 1965, the Cash Collateral Account was credited with the sum of $174,153.12 (A 27a, 41a) and on December 29, 1965, the Cash Collateral Account was credited with the sum of $37,658.83 (A 27a, 41a), making a total of $211,811.95 received into the Cash Collateral Account—more than enough to pay the Vessel's outstanding operating expenses listed on the statement prepared as of "12/2/65," including the Invoice. These funds received into the Cash Collateral Account were earnings of the Vessel under the Charter (A 41a).

On January 6, 1966, Maritime withdrew $210,000.00 from the Cash Collateral Account to be applied towards repayment of the Maritime Advance (A 28a, 41a-42a, 46a-47a),

leaving a balance of $3,475.17 in the Cash Collateral Account. Burbank was not consulted prior to the withdrawal of the funds (A 43a). Burbank has never received funds with which to pay the Invoice or the other Vessel's operating expenses listed on the statement prepared as of "12/2/65" (A 43a).

POINT I

USA Was Not Justified in Withdrawing Funds From the Cash Collateral Account So That the Cost of Fuel Oil Supplied to the Vessel Could Not Be Paid.

By Contract No. MA-3928, USA, Irving and Owner set up the arrangement whereby the Maritime Advance would be repaid (after repayment of the Irving Advance). Stated simply, repayment of the Maritime Advance was to be made from the freight monies earned under the Charter of the Vessel *after payment of the Vessel's operating expenses necessarily incurred in earning those freight monies.* Nothing is more basic to the operation of a vessel and the earning of freight monies than the bunker fuel oil needed to run the vessel. The foregoing arrangement was, in fact, followed and USA, acting through Maritime, would approve as a routine matter without question (A 47a) the transfer of freight monies from the Cash Collateral Account to the Special Account to pay the Vessel's operating expenses as submitted by Burbank.

Thus, Burbank, the operating agent for the Vessel and Owner, ordered bunker fuel oil for the Vessel from Esso in reliance on the foregoing arrangement whereby the Invoice would have been approved and the funds made avail-

able (by transfer from the Cash Collateral Account to the Special Account) for payment to Esso of the Invoice amount. In fact, the funds were available, but USA, without consulting Burbank, withdrew them and paid itself, leaving unpaid those operating expenses, including the Invoice, necessarily incurred in earning the funds.

The language of Contract No. MA-3928, quoted herein, requires payment of the Invoice amount "to the Company [i.e. Owner] (*or its agent*)" [brackets and italics ours], and Burbank, having been approved by Maritime and having worked closely with Maritime as agent for the Vessel (A 7a, T50-53, A 38a-39a), was certainly known to Maritime and was certainly justified in relying on Contract No. MA-3928 and the payment arrangement it established.

In *First Nat'l Bank* v. *Dudley,* 231 F.2d 396 (9 Cir. 1956), a debtor corporation, its creditors and its bank, which had its account and held its promissory note, agreed to the deposit of funds from the sale of its inventory into the account and to the pro rata payment therefrom to the bank and creditors equally. When the debtor filed in bankruptcy, the bank credited all the funds in the account to itself as a set-off against the balance due on the note. The Court held that the bank was estopped from taking the funds, citing the reliance of the creditors and stating, pp. 400-1:

> "Equitable estoppel is an age-old principle of equity. 2 Story, Equity Jurisprudence 776, § 1534 (12th Ed. 1877). Tacit encouragement by conduct has been held sufficient to raise an equitable estoppel. Swain v. Seamens, 1869, 9 Wall. 254, 274, 76 U.S. 254, 19 L.Ed. 554. 'The vital principle,' the Supreme Court has said, 'is that he who by his language or conduct leads another

> to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.' Dickerson v. Colgrove, 1879, 100 U.S. 578, 580, 25 L.Ed. 618.
>
> It may be said generally then that equitable estoppel, as a principle of equity jurisprudence, stands for the basic precepts of common honesty, ordinary fairness, and good conscience, Myers v. Hurley Motor Co., 1927, 273 U.S. 18, 24, 47 S. Ct. 277, 71 L.Ed. 515, in dealing with the rights of those whose conduct has been prompted by reasonable good-faith reliance upon the knowing acts or omissions of another. 3 Pomeroy, Equity Jurisprudence 189-192 §§ 804-805 (5th ed. 1941)."

Similarly, USA's participation in the aforesaid arrangement with Burbank pursuant to Contract No. MA-3928, and Burbank's reliance thereon, must estop USA from repaying itself the Maritime Advance prior to paying the Vessel's operating expenses incurred by Burbank.

POINT II

The *Fitzgerald* Case Is Inapplicable to This Appeal.

Those facts which were found by the District Court in its Memorandum Opinion herein (A 49a-52a) are undisputed but insufficient. Referring to Contracts MA-3927 and MA-3928, the Court found that, "Pursuant to these contracts the owner agreed to apply all monies it received, *except those for operating expense,* to pay its indebtedness to Irving and the government" (italics ours) (A 52a). But the Court ignored the establishment of the Cash Collateral Account and the withdrawal of funds by USA in violation

of the said contracts and Burbank's reliance thereon, leaving the Vessel's operating expenses unpaid.

The District Court viewed the suit as governed by *Fitzgerald* v. *A. L. Burbank,* 451 F.2d 670 (2 Cir. 1971) which case held that USA, as mortgage guarantor and charterer of the ATLAS, was not the vessel owner or employer, within the meaning of the Jones Act, of an engineer who had served on board that vessel until his death on August 1, 1963—two years prior to the execution of Contracts MA-3927 and MA-3928. The District Court concluded that Burbank was the agent for the Owner rather than for USA and thus Burbank was liable to pay plaintiff for the bunker fuel oil. But the Court ignored the question as to whether Contracts MA-3927 and MA-3928, and USA's violation thereof after reliance by Burbank gave Burbank the right of recovery over against USA. This question is unrelated to the matter of whether Burbank was the agent for the owner or for USA and the *Fitzgerald* case, *supra,* has no bearing thereon.

CONCLUSION

The judgment and decree of the District Court dismissing the cross-claim of Burbank against USA should be reversed and judgment should be entered in favor of Burbank and against USA for $31,111.00 plus costs and disbursements.

Respectfully submitted,

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